

## OPINION SUMMARY

### MISSOURI COURT OF APPEALS EASTERN DISTRICT

RICK J. CUSUMANO,	)	No. ED102811
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	11SL-CC05162
	)	
STATE OF MISSOURI,	)	Honorable Mark D. Seigel
	)	
Respondent.	)	Filed: August 2, 2016

Rick J. Cusumano appeals the denial of his Rule 29.15 motion for post-conviction relief. Cusumano asserts that the motion court clearly erred when it concluded that trial counsel did not render ineffective assistance (1) by failing to investigate Detective Gary Fourtney as a potential witness and by failing to call him as a witness at trial; (2) by failing to object to Victim's ex-husband's testimony about Victim's behavioral changes that he suggested resulted from the sexual assault she suffered; and (3) by advising Cusumano not to testify at his second trial. Cusumano also argues that the motion court clearly erred when it concluded that appellate counsel did not render ineffective assistance by failing to cite *Green v. United States*, 355 U.S. 184 (1957), or *Price v. Georgia*, 398 U.S. 323 (1970), in support of the argument that Cusumano's conviction on Count II of the class A felony of forcible rape should be set aside on double jeopardy grounds.

AFFIRMED.

DIVISION THREE HOLDS: The motion court did not clearly err because the record shows that neither trial nor appellate counsel rendered ineffective assistance. The record establishes (1) that trial counsel did not fail to investigate Detective Gary Fourtney as a witness, and Detective Fourtney would not—if called to testify at trial—have produced a viable defense for Cusumano; (2) that trial counsel *did* object to Victim's ex-husband's testimony about her behavioral changes, and such testimony was highly probative and not clearly unduly prejudicial; (3) that trial counsel did not unreasonably advise Cusumano to refrain from testifying at his second trial, since there Cusumano would risk contradicting his testimony from the first trial, which had unnecessarily opened the door to impeachment by character evidence; and (4) that the *Green* and *Price* cases were inapposite because they each involved a prior "implicit acquittal" that established double jeopardy but Cusumano's case involved no prior acquittal of any kind.

Opinion by: James M. Dowd, J.

Robert M. Clayton III, P.J., and Lawrence E. Mooney, J., concur.

Attorney for Appellant: Amy E. Lowe

Attorney for Respondent: Karen L. Kramer

**THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.**